Supreme Court, U.S.
FILED

99 172 JUL 26 1999

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

RUTH L.R. LEVY, GARRY ROEMER, ANTHONY CARLO, GEORGE P. CULLEN, RAYMOND GAST, DESPINA HATZELIS, DONALD LOPES, GERALD T. MAGUIRE, BERNARD RASHES, MICHAEL SAVINO, THOMAS REPASCH, ERNEST ARCIELLO, HARVEY FREELING, JAMES R. BRADLEY, EDWIN B. GRIFFIN, RICHARD SCHLITT, ROBERT G. MURRAY, AMY HUTNER, JOHN PATRICK HARRISON, ALLEN W. GENDLER, RUDOLPH PLESSING and JAMES D. VAN BLARCOM,

Petitioners,

v.

UNITED STATES GENERAL ACCOUNTING OFFICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CAROL R. SHARPE
Counsel of Record
JONATHAN C. MOORE
LAW OFFICES OF
JONATHAN C. MOORE
Attorneys for the Petitioners
740 Broadway at Astor Place
New York, New York 10003
(212) 353-9587

154050

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Rule 15(c)(2) of the Federal Rules of Civil Procedure specifically governs the relation back, for statute of limitations purposes, of an amendment adding *new claims* arising from the same fact occurrence giving rise to the original claim. Rule 15(c)(3) specifically governs the relation back, for statute of limitations purposes, of an amendment adding *new parties against whom claims* arising from the same fact or occurrence giving rise to the original claim are asserted. Neither rule specifically governs the relation back, for statute of limitations purposes, of an amendment adding the *claims of new claimants* arising from the same fact or occurrence giving rise to the original claim.

1. Does Rule 15(c)(2) of the Federal Rules of Civil Procedure apply alone or in conjunction with some or all of Rule 15(c)(3) to an amendment adding a party asserting a claim against a timely served defendant?

LIST OF PARTIES

The following parties were Plaintiffs below and are Petitioners before this Court:

Ruth L. R. Levy, Garry Roemer, Ernest Arciello, James D. Van Blarcom, James R. Bradley, Anthony Carlo, George P. Cullen, Harvey Freeling, Raymond Gast, Allen W. Gendler, Edwin B. Griffin, John Patrick Harrison, Despina Hatzelis, Amy Hutner, Donald Lopes, Gerald T. Maguire, Robert G. Murray, Rudolph Plessing, Bernard Rashes, Thomas Repasch, Richard Schlitt and Michael Savino.[1]

The following party was the Defendant below and is the Respondent before this Court: United States General Accounting Office.

---

1. With the exception of Petitioner Levy, the petitioners will be collectively referred to as the "*Roemer* Plaintiffs". The *Roemer* Plaintiffs filed their own lawsuit, 97 Civ. 4488, in addition to joining in the Amended Complaint in 97 Civ. 4016, which was the original action started by Petitioner Levy. Petitioner Levy and the *Roemer* Plaintiffs will be collectively referred to as the "Petitioners."

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	ix
Opinions Below	1
Statement of Jurisdiction	1
Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ	5
I. The Petition Should Be Granted Because The Decisions Of The Courts Below Conflicts With Decisions Of The Fifth Circuit And The Federal Circuit.	5
II. The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's Prior Rulings On The Proper Scope Of Statutory Construction.	12
Conclusion	15

TABLE OF CITED AUTHORITIES

Page

Cases:

Acosta v. Louisiana Dept. of Health & Human Res., 478 U.S. 251 (1966) 6

Advanced Magnetics, Inc. v. Bayfront Partners, Inc., 106 F.3d 11 (2nd Cir. 1997) 5

Allied Intern. v. Intern. Longshoremen's Ass'n, 814 F.2d 32 (1st Cir. 1987), *cert. denied*, 484 U.S. 820, 108 S. Ct. 79 (1987) 8, 9, 10

Andujar v. Rogowski, 113 F.R.D. 151 (S.D.N.Y. 1986) 9, 10, 11

Bailey v. United States, 516 U.S. 137 (1995) 13

Barrow v. Wethersfield Police Dep't, 74 F.3d 1366 (2nd Cir. 1996), *modifying*, 66 F.3d 466 (2nd Cir. 1995) 5, 6

Business Guides, Inc. v. Chromatic Communications, 498 U.S. 533 (1990) 13, 14

Connecticut National Bank v. Germain, 503 U.S. 249 (1992) 13, 14

Cornwell v. Robinson, 23 F.3d 694 (2nd Cir. 1994) 5, 6

DeFranco v. United States, 18 F.R.D. 156 (S.D. Cal. 1955) 10

Cited Authorities

	Page
Employees Sav. Plan of Mobil Oil Corporation v. Vickery, 99 F.R.D. 138 (S.D.N.Y. 1983)	9
Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992)	13
Flores v. Cameron County, Texas, 92 F.3d 258 (5th Cir. 1996)	8
Gleason v. McBride, 869 F.2d 688 (2nd Cir. 1989)	5, 6
Goldenberg v. World Wide Shippers and Movers, 236 F.2d 198 (7th Cir. 1956)	10
Halloway v. United States, 119 S. Ct. 966 (1999)	13
Harris v. Nelson, 394 U.S. 286 (1968)	13, 14
Hernandez Jiminez v. Calero Toledo, 604 F.2d 99 (1st Cir. 1979)	6
Hughes Aircraft Company v. Jacobson, 119 S. Ct. 755 (1998)	13, 14
In re Chaus Sec. Litig., 801 F. Supp. 1257 (S.D.N.Y. 1992)	11
In re Integrated Resources Real Estate Securities Litigation, 815 F. Supp. 620 (S.D.N.Y. 1993)	11

Cited Authorities

Page

LandGraf v. USI Film Products, 511 U.S. 244 (1994) 14

Levy, et al. v. United States General Accounting Office, 97 Civ. 4016 (MBM) (S.D.N.Y) 3, 4, 8, 10, 12

Mackensworth v. S.S. Am. Merchant, 28 F.3d 246 (2nd Cir. 1994) 11

Meghrig v. KFC Western, 516 U.S. 479 (1996) ... 14

Nelson v. County of Allegheny, 60 F.3d 1010 (3rd Cir. 1995) 6

Neufeld v. Neufeld, 910 F. Supp. 977 (S.D.N.Y. 1996) 9

Nielsen v. Professional Financial Management, Ltd., 682 F. Supp. 429 (D. Minn. 1987) 10

Paskuly v. Marshall Field & Co., 646 F.2d 1210 (7th Cir. 1981) 10

Pavelic v. Marvel Entertainment Group, 493 U.S. 120 (1989) 13

Red Rock Commodities, Ltd., v. M/V Kopalnia Szombierki, 1994 WL 440822 (S.D.N.Y. 1994) 9, 10

Cited Authorities

Page

Roemer, et al., v. United States General Accounting Office, 97 Civ. 4488 (S.D.N.Y. filed June 18, 1997) ..... ii, 1, 3, 4, 8, 10, 12

Siegel v. Converters Transportation, Inc., 714 F.2d 213 (2nd Cir. 1983) 11

Snoqualmie Tribe of Indians v. United States, 372 F.2d 951, 178 Ct. Cl. 570 (1967) 6, 7

Soler v. G&U, Inc., 103 F.R.D. 69 (S.D.N.Y. 1984) 10

Soto v. Brooklyn Correctional Facility, 80 F.3d 34 (2nd Cir. 1996) 5, 6

Staren v. American National Bank and Trust Company of Chicago, 529 F.2d 1257 (7th Cir. 1976) 9

Stoppelman v. Owens, 580 F. Supp. 944 (D.D.C. 1983) 10, 11

Williams v. United States, 405 F.2d 234 (5th Cir. 1968) 7, 8

Cited Authorities

Page

Rules:

Fed. R. App. P. 4 6

Fed. R. Civ. P. 12(b)(1) 1, 4

Fed. R. Civ. P. 15 12

Fed. R. Civ. P. 15(a) 4

Fed. R. Civ. P. 15(c) 1, 2, 5, 7, 10, 11

Fed. R. Civ. P. 15(c)(2) i

Fed. R. Civ. P. 15(c)(3) ..... i, 5, 6, 12, 13, 14

Fed. R. Civ. P. 15(c)(3)(B) 6, 12

Indian Commission Rule 13(c) 7

United States Supreme Court Rule 13.1 ..... 2, 4

Other Authorities:

3 Moore's Federal Practice, Para. 15.19[1] at 15-79 11

6 Wright & Miller, § 1501 (1st ed. 1971 & Supp. 1986) 11

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Second Circuit Dated And Decided April 26, 1999 ..... 1a

Appendix B — Opinion And Order Of The United States District Court For The Southern District Of New York Dated April 20, 1998 ..... 3a

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 26, 1999, to address an important question as to the scope of Federal Rule of Civil Procedure 15(c) and in order to resolve a conflict between the Second Circuit, on the one hand, and the Fifth Circuit and the Court of Appeals for the Federal Circuit (as successor to the Court of Claims) on the important issue presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit that gives rise to this petition is unpublished. It is reprinted in Appendix A hereto ("App. A") at page 1a.

The opinion of the United States District Court for the Southern District of New York is reported at 1998 WL 193191 (S.D.N.Y. 1998). It is reprinted in Appendix B hereto ("App. B") at page 3a.

STATEMENT OF JURISDICTION

On April 20, 1998 the United States District Court for the Southern District of New York, by the Honorable Michael B. Mukasey, granted the motion of Respondent The United States General Accounting Office (hereinafter referred to as "GAO" or the "Respondent"), pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure to dismiss the *Roemer* Plaintiffs from these consolidated actions. Review was sought in the United States Court of Appeals for the Second Circuit.

On August 26, 1999, the Second Circuit denied Petitioners' appeal in all respects. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the judgment.

STATUTES INVOLVED

Rule 15(c) of the Federal Rules of Civil Procedure provides, in relevant part:

> (c) **Relation Back of Amendments**. An amendment of a pleading relates back to the date of the original pleading when
>
> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identify of the proper party, the action would have been brought against the party.

STATEMENT OF THE CASE

On August 7, 1995, the Petitioners were all over 40 years of age and were employed as evaluators in the GAO's New York office. On that date, the Comptroller General announced his decision to close the GAO's New York office and certain other offices of the GAO and terminate all personnel in those offices. On November 10, 1995, the GAO closed the New York office and all personnel then assigned to it were involuntarily separated from their employment with the GAO.

In January, 1996 the Petitioners filed separate, timely administrative charges of unlawful age discrimination with the GAO. On March 6, 1997, the GAO issued a final agency decision denying the Petitioners' claims in their entirety and informed each of the Petitioners by certified mail that if he/she wished to challenge that decision in federal court, he/she was required under the ADEA to file a complaint within 90 days of receipt. The 90 day period expired for all the Petitioners between June 6, 1997, and prior to June 18, 1997.

On June 2, 1997, Levy filed her complaint in federal court on her own, *Levy v. United States General Accounting Office*, 97 Civ. 4016 (MBM) (S.D.N.Y), against the GAO alleging intentional age discrimination under the ADEA. Levy's complaint alleged that the GAO sacrificed her and the other 46 evaluators on the staff of the New York office in order to save the jobs of younger evaluators employed by GAO nationwide in violation of the Age Discrimination in Employment Act ("ADEA"). On June 18, 1997, the *Roemer* Plaintiffs filed a similar complaint in federal court against the Respondent. *Roemer, et al., v. United States General Accounting Office*, 97 Civ. 4488 (S.D.N.Y. filed June 18, 1997).

After consolidating the two actions for discovery, but before the GAO had responded to the *Levy* complaint, the District Court granted Levy's motion to amend her complaint pursuant to Rule 15(a), without prejudice to the GAO's right to challenge Levy's adding the *Roemer* Plaintiffs' claims on the ground that those claims were time-barred.

On September 18, 1997, Levy amended her complaint by adding the Petitioners as co-plaintiffs in her lawsuit and integrating the language of the two complaints. The Respondent then moved to dismiss the *Roemer* Plaintiffs' complaint in its entirety, and to dismiss them from the *Levy* complaint, in each case on the ground that the District Court lacked subject matter jurisdiction over the *Roemer* Plaintiffs' claims pursuant to Rule 12(b)(1).

On April 20, 1998, the District Court granted the Respondent's motion to dismiss. Judgment pursuant to the Court's decision granting the Respondent's motion for summary judgment was entered by the Clerk of the Court on April 30, 1998. In its April 20th decision the District Court also dismissed the claims of the *Roemer* Plaintiffs in *Levy, et al. v. United States General Accounting Office*, 97 Civ. 4016 (MBM). Partial judgment in *Levy* was entered on June 30, 1998, the District Court reasoning that since all the Petitioners raised identical claims of age discrimination and a partial judgment in *Levy* would avoid the possibility of duplicative trials in the event of a reversal by the Court of Appeals. On April 26, 1999, the Second Circuit denied Petitioners' appeal in all respects.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISIONS OF THE COURTS BELOW CONFLICTS WITH DECISIONS OF THE FIFTH CIRCUIT AND THE FEDERAL CIRCUIT.

The lack of any express provision in Rule 15(c) with respect to relation back amendments adding plaintiffs, as discussed *post* in Point II, has led to conflicting opinions in the lower courts. Because of the importance of clarity on this issue to the orderly administration of the law, the petition should be granted so that this Court may provide clear guidelines on the question of what rule or standard applies to determine when an amendment adding plaintiffs to a timely filed complaint arising out of the same transaction or occurrence and alleging identical claims relates back to the filing of the original complaint.

The Second Circuit's approach, which was followed in this case, applies Rule 15(c)(3) to require plaintiffs to demonstrate that "but for a mistake concerning the new plaintiff's identify, the action would have been brought on that party's behalf." *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 19 (2nd Cir. 1997). *See also Soto v. Brooklyn Correctional Facility*, 80 F.3d 34, 35 (2nd Cir. 1996); *Barrow v. Wethersfield Police Dep't*, 74 F.3d 1366, 1367 (2nd Cir. 1996), *modifying*, 66 F.3d 466 (2nd Cir. 1995); *Cornwell v. Robinson*, 23 F.3d 694, 705 (2nd Cir. 1994); *Gleason v. McBride*, 869 F.2d 688, 694 (2nd Cir.

1989).[2] This same construction of Rule 15(c)(3) has also been followed in the Third Circuit. *Nelson v. County of Allegheny*, 60 F.3d 1010, 1014 (3rd Cir. 1995).

The Second and Third Circuit's application of the mistake requirement of Rule 15(c)(3), conflicts with decisions of the First Circuit and the Court of Appeals for the Federal Circuit (formerly the Court of Claims) which permits the relation back of claims of new plaintiffs without regard to the "mistake" language in Rule 15(c)(3)(B). Under the circumstances, certiorari is appropriate here to resolve an important controversy over the proper interpretation of a federal rule of procedure. *See Acosta v. Louisiana Dept. of Health & Human Res.*, 478 U.S. 251, 253 (1966) (Court granted petition to resolve conflicting interpretations of Fed. R. App. P. 4 and affirmed in *per curiam* opinion).

A case well articulating the conflicting view is a decision by the Court of Claims (now the Court of Appeals for the Federal Circuit) in *Snoqualmie Tribe of Indians v. United States*, 372 F.2d 951, 178 Ct. Cl. 570 (1967). This case involved an attempt by one Indian tribe suing the United States for violation of a treaty to amend its complaint to present the claims on behalf of another tribe also affected

2. Most of these cases are distinguishable because they involve relation back amendments to ***add defendants*** who were not already parties to the suit during the limitations period. *See Soto v. Brooklyn Correctional Facility*, 80 F.3d 34 (2nd Cir. 1996); *Barrow v. Wethersfield Police Dep't*, 74 F.3d 1366 (2nd Cir. 1996), *modifying*, 66 F.3d 466 (2nd Cir. 1995); *Cornwell v. Robinson*, 23 F.3d 694 (2nd Cir. 1994); *Gleason v. McBride*, 869 F.2d 688 (2nd Cir. 1989). *Accord, Hernandez Jiminez v. Calero Toledo*, 604 F.2d 99, 103 (1st Cir. 1979). The other cases cited by the courts below contain the same result-oriented conclusion which other courts have justifiably criticized.

by the same violation. The defendant United States argued that the relation back provision of Indian Commission Rule 13(c) — which was substantially identical to Fed. R. Civ. P. 15(c) then in effect — could not be used to overcome a "jurisdictional" statute of limitations and that it did not have adequate notice of the claims. The Court of Claims disagreed on both points, finding that the claims of the original and proposed new plaintiff in that case were "sufficiently closely related to warrant the conclusion that the government received adequate notice of the possibility that it might have to defend against a broader claim." *Id.* at 961. More importantly, the Court in *Snoqualmie* imposed no mistake requirement on the plaintiff in order to permit the filing of an otherwise time barred claim to relate back to the filing of another claim.

The Fifth Circuit applied the conflicting view in *Williams v. United States*, 405 F.2d 234 (5th Cir. 1968). In *Williams*, the Fifth Circuit reversed the district court's denial of the amendment permitting a new plaintiff to be added to a complaint to assert a claim against the Government which otherwise would have been time barred. Without imposing any mistake requirement as the courts below did in the case *sub judice*, the Court held that when a new plaintiff with a new claim that arose out of a common set of operational facts is sought to be added after the statute of limitations has lapsed, "[n]ot only must the adversary have had notice about the operational facts, but it must have had fair notice that a legal claim existed in and was in effect being asserted by, the party belatedly brought in." *Id.*, 405 F.2d at 238.

There appears to have been no mistake as to the identity or nomenclature of either the defendant or the proposed new plaintiff, and there was no discussion in that case that the

proposed new plaintiff had to establish mistake in order to satisfy the court that her claim was timely. The holding in *Williams* was affirmed in *Flores v. Cameron County, Texas*, 92 F.3d 258, 273 (5th Cir. 1996).[3]

The courts below were concerned that permitting the *Roemer* Plaintiffs to proceed with their claims in the *Levy* action would circumvent or expand the limitations period relevant to such claims. However, that this might occur in certain cases does not end the inquiry. *Williams* found the critical inquiry to be not whether there might be some prejudice from permitting the amendment, such as subjecting the Government to a claim it would not otherwise have had to defend against, but whether there was "fair notice that a legal claim existed in and was in effect being asserted by . . . the party belatedly brought in," *Id.*, 405 F.2d at 238, and whether there is an identity between the new and old plaintiffs. While there is no question here whether the GAO had fair notice of the legal claims of the *Roemer* Plaintiffs prior to the expiration of limitations period to bring suit, or whether there was a close identity between the new and old Petitioners herein, the courts below applied the mistake test.[4]

3. There is nothing unique to the fact that an agency of the United States Government is the defendant in this case that contravenes the general principles that favors relation-back amendments to add claims of additional plaintiffs that would otherwise be time-barred, so long as the factors which generally favor such amendments are present. Since the United States Government was already properly before the Court in the *Levy* case, the concerns raised by the courts below that relation back amendments may offend notions of sovereign immunity simply carry no weight.

4. In *Allied Intern. v. Intern. Longshoremen's Ass'n*, 814 F.2d 32, 35 (1st Cir. 1987), *cert. denied*, 484 U.S. 820, 108 S. Ct. 79 (1987) the First Circuit in a slightly different context reached a result

(Cont'd)

Other lower federal courts have permitted amendments adding new parties whose claims would otherwise be time-barred, without requiring the finding of a mistake as the Second Circuit now does. *See, e.g., Neufeld v. Neufeld*, 910 F. Supp. 977, 985-86 (S.D.N.Y. 1996); *Andujar v. Rogowski*, 113 F.R.D. 151, 154-155 (S.D.N.Y. 1986); *Employees Sav. Plan of Mobil Oil Corporation v. Vickery*, 99 F.R.D. 138, 143 (S.D.N.Y. 1983) ("[a]s long as a defendant has received notice of the action, and is prepared to defend against it, 'his ability to protect himself will not be prejudicially affected if a new plaintiff is added, and he should not be permitted to invoke a limitation defense.' "); *Red Rock Commodities, Ltd., v. M/V Kopalnia Szombierki*, 1994 WL 440822 (S.D.N.Y.

(Cont'd)
contrary to that adopted by the Second Circuit here and permitted the amendment of a complaint substituting a plaintiff into the litigation whose claim was otherwise time-barred. The Court found that, when substituting a fresh plaintiff for the original one, three requirements had to be met to permit the relation back amendment:

> the amended complaint must arise out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading; there must be a sufficient identity of interest between the new plaintiff, the old plaintiff, and their respective claims so that the defendants can be said to have been given fair notice of the latecomer's claim against them; and undue prejudice must be absent.

Id., 814 F.2d at 35-36. *See also Staren v. American National Bank and Trust Company of Chicago*, 529 F.2d 1257 (7th Cir. 1976).

1994); *Nielsen v. Professional Financial Management, Ltd.*, 682 F. Supp. 429, 435-36 (D. Minn. 1987).[5]

Stoppelman v. Owens, 580 F. Supp. 944 (D.D.C. 1983), for example, involved two limited partners in an oil well equipment investment plan. They sued the general partner one day prior to the expiration of the statute of limitations. After the running of the statute of limitations, they sought to amend their complaint to add as plaintiffs other limited partners who had also invested in the venture. Defendants asserted that Rule 15(c) could not apply to a situation where a plaintiff barred by a statute of limitation attempted to join an action brought by other plaintiffs prior to the running of the limitations period. The Court in *Stoppelman* found that absent some legally cognizable prejudice, the amendment would be allowed. Citing the case of *DeFranco v. United States*, 18 F.R.D. 156 (S.D. Cal. 1955), a tax case, the court concluded that because the addition of the new plaintiffs did not set up a new claim against the defendant (that is, the wrong was the same), and because the defendant was aware and had notice from the beginning that the wrong the original plaintiffs sought to remedy involved a wrong to the proposed plaintiff as well, the amendment and relation back would be

---

5. It is true that permitting the *Roemer* Plaintiffs to proceed in the *Levy* case might increase the GAO's financial exposure should the *Roemer* Plaintiffs prevail on their claims. However, the courts are clear that this kind of prejudice is not a legally cognizable prejudice in this context. So long as the original complaint gives defendant adequate notice, an amendment relating back is proper even if it exposes a defendant to greater damages. *Andujar*, 113 F.R.D. at 157; *Soler v. G&U, Inc.*, 103 F.R.D. 69, 74-75 (S.D.N.Y. 1984); *Allied Intern.*, 814 F.2d at 37; *Goldenberg v. World Wide Shippers and Movers*, 236 F.2d 198, 200-01 (7th Cir. 1956); *Paskuly v. Marshall Field & Co.*, 646 F.2d 1210 (7th Cir. 1981).

permitted "even though the applicable statute of limitations had expired." *Stoppelman*, 580 F. Supp. at 946.[6]

---

6. The concern with adding new defendants, which is specifically provided for in Rule 15(c), is different than that involving the addition of new plaintiffs to an already timely action. The principle in the former situation is to ensure fairness and prevent surprise to a defendant from institution of a claim that has been dormant for so long that proof, witnesses and memories have disappeared. *Mackensworth v. S.S. Am. Merchant*, 28 F.3d 246, 252 (2nd Cir. 1994); *In re Chaus Sec. Litig.*, 801 F. Supp. 1257, 1264 (S.D.N.Y. 1992). That principle is not transgressed in the circumstances of the case *sub judice*. As numerous courts have stated, where the defendant was on notice of the lawsuit from the original complaint and the addition of other plaintiffs did not bring any new claims into the action, "the purpose behind the statute of limitations, namely notice, is not defeated . . . by permitting the amended complaint to relate back." *Stoppelman*, 580 F. Supp. at 947. *See also In re Integrated Resources Real Estate Securities Litigation*, 815 F. Supp. 620, 644 (S.D.N.Y. 1993).

"As long as a defendant is fully apprised of a claim arising from specific conduct and has prepared to defend the actions against him, he will not be prejudiced by the addition of a new plaintiff and thus should not be allowed to raise a limitations defense." 6 Wright & Miller, § 1501 (1st ed. 1971 & Supp. 1986) (quoted in *Andujar v. Rogowski*, 113 F.R.D. at 155; 3 Moore's Federal Practice, Para. 15.19[1] at 15-79 ("The purpose of the statute of limitations is to prevent stale claims. The rationale for allowing an amendment to relate back is that once a party is notified or litigation involving a specific factual occurrence, the party has received all the notice and protection that the statute of limitations requires."). *See also Siegel v. Converters Transportation, Inc.*, 714 F.2d 213, 216 (2nd Cir. 1983) (rationale of Rule 15 is to "ameliorate the effects of the statute of limitations.").

(Cont'd)

This body of decisional law and commentary conflicts the with approach adopted by the Second Circuit in this case and the Third Circuit. Because a conflict exists between the circuits, certiorari should be granted to settle this issue, an issue which is of vital importance to the administration of the civil laws.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE PROPER SCOPE OF STATUTORY CONSTRUCTION.

The courts below decided that Federal Rule of Civil Procedure 15(c)(3), particularly the mistake requirement found in Rule 15(c)(3)(B), applied to relation back amendments adding new plaintiffs alleging claims identical to those filed in an otherwise timely filed complaint. In so doing, the courts below read into the rule a meaning that is not stated or implied by the plain language of the rule.

Rule 15(c)(3) states clearly that an "amendment of a pleading relates back to the date of the original pleading when . . . the amendment changes the party or the naming of *a party against whom a claim is asserted* . . ." As is clear from the explicit language quoted above, Rule 15(c)(3) applies

---

(Cont'd)

All the protections afforded to the Respondent in this case by the statute of limitations was accomplished by the filing of the original *Levy* complaint. The original *Levy* complaint gave the GAO more than adequate notice of the *Roemer* Plaintiffs' claims. The GAO was clearly aware both of the full extent of these claims during the limitations period and of the close relationship between Levy and the *Roemer* Plaintiffs.

only to amendments adding new defendants. The decisions below, which applied Rule 15(c)(3), runs afoul of this Court's often repeated principle that the plain language of a statute should be given its literal meaning.

As this Court has stated, "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank v. Germain*, 503 U.S. 249, 254 (1992). It is the language of the statute which provides the most reliable evidence of congressional intent" *Bailey v. United States*, 516 U.S. 137, 145 (1995); *Halloway v. United States*, 119 S. Ct. 966, 969 (1999). For this reason, statutory construction always begins with the language of the statute. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992); *Hughes Aircraft Company v. Jacobson*, 119 S.Ct. 755, 760 (1998). When the words of a statute prove unambiguous, "this first cannon is also the last; judicial inquiry is complete." *Hughes Aircraft Company v. Jacobson*, 119 S. Ct. 755, 760 (1998). *See also Connecticut National Bank v. Germain*, 503 U.S. 249, 254 (1992).

This rule of statutory construction applies with full force to the Federal Rules of Civil Procedure. As this Court stated, "We give the Federal Rules of Civil Procedure their plain meaning and generally with them as with a statute, when we find the terms unambiguous, judicial inquiry is complete." *Business Guides, Inc. v. Chromatic Communications*, 498 U.S. 533, 540-41 (1990). *See also Pavelic v. Marvel Entertainment Group*, 493 U.S. 120, 123 (1989). This Court has been wary to read too much into the Federal Rules of Civil Procedure, avoiding any interpretation which exceeds the actual words of the statute. "We have no power to rewrite the rules by judicial interpretations." *Harris v. Nelson*, 394

U.S. 286, 298 (1968). *See also LandGraf v. USI Film Products*, 511 U.S. 244, 286 (1994).

Rule 15(c)(3) applies to "a party against whom a claim is asserted". As the meaning of these words is both clear and unambiguous, it is presumed that the legislature has "said what it means," *Connecticut National Bank v. Germain*, 503 U.S. 249, 254 (1992), and further judicial inquiry into the meaning of the statute is complete. *Hughes Aircraft Company v. Jacobson*, 119 S. Ct. 755, 760 (1998).

Rule 15(c)(3) provides a specific remedy in a specific situation that does not exist in the case *sub judice*. For a court to read more into Rule 15(c)(3) would overturn Congress' intent. *Meghrig v. KFC Western*, 516 U.S. 479, 488 (1996). Instead, the Supreme Court should follow its own recent precedent in *Business Guides* and *Landgraff* and avoid reading more into 15(c)(3) than what it's plain meaning fairly conveys.

Certiorari should be granted is this case to ratify the precept that the same rules of construction apply to the Federal Rules of Civil Procedure as to other legislation passed by Congress.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CAROL R. SHARPE
Counsel of Record
JONATHAN C. MOORE
LAW OFFICES OF
JONATHAN C. MOORE
Attorneys for the Petitioners
740 Broadway at Astor Place
New York, New York 10003
(212) 353-9587